No. 622

IN THE

Supreme Court of the United States

OCTOBER TERM 1945

MATTIE BRADEY, as Administratrix of the Estate of Marion Thomas Bradey, deceased,

Petitioner,

against

UNITED STATES OF AMERICA, as represented by War Shipping Administration,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

SIMONE N. GAZAN,
Proctor for Petitioner,
One Broadway,
New York City.

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MISCELLANEOUS

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Mattie Bradey, as Administratrix of the Estate of Marion Thomas Bradey, deceased, respectfully prays a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Second Circuit, entered on the 2nd day of November, 1945, affirming a decree against Petitioner which dismissed her libel.

The decedent was a navy crewman on the United States destroyer "Parrott" and he was killed when his vessel met in collision with the Liberty ship "John Morton", a merchant vessel.

The decision complained of was upon the ground that, since the United States had established a pension system for the benefit of disabled naval personnel, or, in case

of death, for the surviving dependents, there was no right of action against the War Shipping Administration to recover damages.

This decision has not yet been officially reported.

Statement of the Case

The steamship "John Morton", a Liberty ship, was operated by Luckenbach Steamship Company, as general agent for War Shipping Administration.

This vessel was manned, equipped and supplied by the said agent for the account of War Shipping Administration. She was manned by a civilian crew of merchant seamen and this vessel was classified by the government as a merchant vessel.

She had been allocated to serve the army in transporting war material to Europe, and at the time of the collision, hereinafter described, she had loaded coal for the armed forces and was proceeding to take on additional army cargo when the collision occurred.

Nothwithstanding her assignment to serve the army, she remained in the possession, custody and control of the general agent; continued to be manned by her civilian officers and crew; her berthing, loading, ballast and navigation remained in the hands of her civilian personnel.

The destroyer "Parrott' was a vessel of war on which Marion Thomas Bradey and John D. Goeller, Jr., were navy firemen.

The destroyer was at her pier in Norfolk, head in, which put her at right angles to the channel of Norfolk harbor.

The steamship "John Morton" was proceeding out of port, on right side of the channel, which put the destroyer "Parrott' on her right or starboard.

As the "John Morton" was nearing a point about opposite the pier where the "Parrott" was, the "Parrott" started backing out from the pier and continued to back toward the channel, and toward the "John Morton".

These two vessels collided and Marion Thomas Bradey and John D. Goeller, Jr. were killed.

The personal representatives of these men brought libels *in personam* against the United States, as represented by the War Shipping Administration, to recover damages for the surviving parents under the death statute of Virginia, which statute was duly pleaded.

That statute is not a mere re-enactment of the Lord Campbell's Act providing for a survival of any cause of action which the deceased might have had, as erroneously found by the Circuit Court of Appeals. True, it created a right of action to recover damages for death, but it was not a survival statute. The elements of damage were not confined to pecuniary loss, but allowed recovery for the loss of the companionship and comfort of their son; for the grief suffered by reason of the son's untimely death; heartaches and anguish which the parents suffered in thinking of the pain and torture endured by the son when he received his fatal injuries.

This statute created a new and original cause of action in the parents and was not the survival of a right of action which might otherwise have died with the deceased. It was born at the moment of death. It was expressly made applicable to maritime torts.

The Litigation

The Respondent excepted to the libel upon the grounds that,

(a) The deceased having been a seaman on a United States war vessel, and the other ship involved being

owned by the United States, and, because carrying war material, was a public vessel, therefore there was no right enforceable under either the Suits in Admiralty Act or the Public Vessels Act, as the United States had not consented to be sued in respect of such claim;

(b) Since deceased was a navy crewman on a war vessel, his dependents were entitled to federal pensions and because of that it was against the public policy of the United States to pay both pensions and damages.

The District Court sustained ground (b) and dismissed the libel because it held that it was against public policy to entertain such suit.

Bradey v. *United States,* 1945 A. M. C. 777.

An appeal was taken to the Circuit Court of Appeals which considered all grounds of error assigned, and affirmed the District Court.

Petitioner now seeks certiorari to review that decision.

Jurisdiction

The jurisdiction of this court to entertain this Petition, and to grant the same, is provided by section 347 of Title 28, of the United States Code.

Opinion Below

The opinion of the Circuit Court of Appeals, by a unanimous bench, held that,

a. It was against the public policy of the United States to permit naval personnel to sue for damages inflicted by a vessel not his own, since the government provides pension benefits, and there cannot be a collection of pensions and also damages flowing from the same cause.

b. The steamship "John Morton", a merchant ship, manned, operated and navigated by civilians, became a public vessel from the mere fact that she had been allocated to carry war material for the Army, and that under the Public Vessels Act there was no right in the parents of a deceased navy crewman to sue a public vessel for damages.

c. The Death Statute of Virginia, sued upon, created no right of action enforceable by such parents as against the United States, since the pension law provided the exclusive benefits.

d. That the Virginia Death Statute was akin to the Lord Campbell's Act, overlooking the fact that the statute created a new and original cause of action, with new elements of damages recoverable and not based upon pecuniary loss or dependency.

e. Because Public Law 17 kept merchant seamen, employed by the War Shipping Administration, in the category of private employees so as to retain all existing rights of merchant seamen, and so as not to be considered civil employees of the United States and thereby come under the Federal Employees' Compensation Act; that implicit in that law there was an intention by Congress that federal employees could not get both damages and compensation.

Errors Below

The Circuit Court of Appeals entirely lost sight of the following facts:

a. The suit was predicated upon a state statute of Virginia which gave surviving parents a right to recover damages for elements which come into being coincident with the death, such as the loss of the comfort and society of their son; *their* suffering arising out of the pain and

anguish *endured by their son*, and other sentimental elements.

b. The death having occurred in the harbor of Norfolk, no federal statute applied because the Death on the High Seas Act had no application and there is no right of action for death under the general admiralty law. The cause of action was created and governed solely by state statute.

c. Public Law 17, which saved to merchant seamen employed by the War Shipping Administration, their independent status as private employees, does not justify the conclusion reached by the Circuit Court of Appeals that "Congress regards the two remedies (damages or compensation) as mutually exclusive". We seek to enforce not a right created by Congress but a right created by the State of Virginia, and we are not seeking benefits from either of two federal laws, or under any federal law.

d. The Virginia Death Statute is something more than a re-enactment of the Lord Campbell's Act, as the Circuit Court thought. It is entirely new. It provides for elements of damages to parents regardless of pecuniary loss or dependency. It creates an original right of action and is not a mere survival statute. The parents had the right to sue to recover those elements of damages notwithstanding any pension benefits, to which they were entitled in any event.

e. Employees of the United States are not excluded from the rights provided by the Public Vessels Act. It may be against the public policy of the United States for a navy crewman to sue for damages inflicted by *his own vessel*, but there is no law or public policy which would deny such navy crewman the right to sue *some other vessel* which may have negligently inflicted the injury.

f. The steamship "John Morton" was not, at the time of the collision, a "public vessel", and the Circuit Court of Appeals overlooked the fact that, although allocated to carry war material, she was manned by a civilian crew; operated by a private corporation as agent; navigated by civilian officers and that civilians had charge of her berthing, ballasting and loading. She was a merchant ship; custody and control being retained by civilian operators.

g. Even if the steamship "John Morton" be deemed to have been a "public vessel", the Petitioner was entitled to sue under Public Vessels Act, and the Circuit Court of Appeals overlooked the facts which differentiated this instant case from the *Dobson* case (27 Fed. (2d) 807). In the *Dobson* case the navy crewman sought to recover against the owner of *his own ship*, a submarine, for negligent navigation. Petitioner here is suing the owner of *the other ship*, not the destroyer on which decedent had served.

h. There is no present public policy which discourages suits against the United States for tort. Fact is, by consistent legislation, the United States has put itself in the category of a private steamship company, subject to suit under the same circumstances as would a private owner, except that the suit must be in admiralty.

The United States is liable, under the Jones Act, for negligence.

The United States is liable, under general maritime law, for unseaworthiness.

The United States is liable, under Death on High Seas Act, for death.

The United States is liable, under state death statutes, for death within the territorial waters of the state.

There is now pending in Congress a Bill (H. R. 181) known as Federal Tort Claims Act which, if enacted, will

permit suits in the federal district courts to collect damages for torts committed by "employees of any federal agency, members of the military or naval forces of the United States".

That Bill further indicates the policy of Congress to practically do away with sovereign immunity as a defense to damage suits.

The *Dobson* case is not authority for dismissing the libel.

i. The Circuit Court of Appeals failed to recognize the duality of character of the United States as a sovereign and again as a business concern, engaged in private shipping enterprises.

The United States, as a sovereign, owns its naval vessels. The United States, as a shipping concern, owns the fleet of Liberty ships and other cargo vessels, which is operated by War Shipping Administrator, as a business distinct from the performance of purely governmental functions, like maintaining a navy.

There has always been this separation of activities. The old Shipping Board; the Fleet Corporation and the Maritime Commission, were each suable as if a private concern, and the War Shipping Administrator is merely their successor, subject to suit as if an independent entity.

The Petitioner seeks to sue this business or commercial enterprise, the War Shipping Administration, as disassociated from the sovereign United States, performing purely governmental functions.

That such dual character exists and was recognized, appears not only from decisions of this and other courts, but from various legislative and official sources.

The War Shipping Administration, as successor to The Maritime Commission, acquired "all the general and implied powers of a business corporation".

Opinion of the Attorney General, 1944 A. M. C. at page 595. 46 U. S. C. A. 1113-1118.

"In the exercise of its various functions and in the conduct of its activities, the War Shipping Administration in general is authorized to operate with the powers of a business or commercial organization under the provisions of the Merchant Marine Act, 1936 * * *. Additional flexibility is obtained through the Suits in Admiralty Act which furnishes authority for the settlement or compromise by the Administrator of claims arising out of the operation of the merchant or public vessels under his control."

Report of Senate Committee on Commerce, (Senate Report No. 62, Feb. 22, 1943);
No. 1 United States Code Congressional Service, 1943, at page 2-12.

The Questions Presented

1. Does the fact that a merchant vessel, manned by a civilian crew, and operated and navigated by a private steamship corporation, which retains actual custody and control of the ship, become a public vessel merely because she has been allocated to carry war material for the Army?

2. Does Public Law 17 evidence any public policy of the United States against navy crewmen suing to recover damages for third party negligence, albeit the third party is the War Shipping Administration, because of the existence of federal pension laws?

3. Does the fact that the United States, as a sovereign, employs crews for its navy, and also, as a separate and distinct activity, through the War Shipping Administration, operates merchant vessels, manned by civilian seamen, prevent a suit by such navy crewmen against the

War Shipping Administration, to recover damages negligently inflicted by the merchant vessel?

4. Whether naval personnel on a war vessel, injured or killed by the negligence of another vessel, operated by the War Shipping Administration, a business enterprise of the United States, have the right to sue for damages for tort notwithstanding such naval crewmen are entitled to federal pensions?

5. When the death of a navy crewman occurs within the territorial limits of a state, and occasioned by the negligence of a vessel, not his own, and the laws of such state create a liability for damages other than pecuniary loss to dependents, can the parents of such deceased crewman bring suit under that state law against the United States, as represented by the War Shipping Administration, notwithstanding the parents may be entitled to federal pensions?

6. Does the mere fact that the United States as sovereign, has established a pension system for its military personnel and surviving dependents, estop or bar the parents of a deceased navy crewman from suing the business branch of the United States, under a state death statute, for the special elements of damage authorized thereunder, and personal unto the parents, where the death was caused by the negligence of another vessel?

The foregoing involve important questions of federal law, wrongly decided by the Circuit Court of Appeals, which have not been decided but which should be settled by this Court.

The decision of the Circuit Court of Appeals is upon a federal question in a way probably in conflict with an applicable decision of this Court, to-wit, *Dahn* v. *Davis, Agent,* 258 U. S. 421, wherein this Court held that an employee of the United States Post Office, as railway mail clerk, could sue the Director General of Railroads, a federal agency, for negligence.

The questions presented are of general public interest, affecting large elements of our citizens and as to which there should be an authoritative pronouncement.

Reasons Relied on for Granting the Writ

A decision on these questions is vitally needed because many cases, in behalf of naval personnel injured in the line of duty, are now pending against the United States, arising out of negligent operation of merchant vessels. For instance:

The right of gun crews on Liberty ships, injured by the negligence of the merchant seamen or officers, to recover damages, has been challenged because, as navy employees, they are entitled to disability pensions.

The right of army base carpenters, who are civil employees of the United States, but who work on Liberty ships shoring cargo, and injured through the negligence or unseaworthiness of the merchant vessel, operated by the U. S. A., to recover damages, has been challenged because, as civil employees, they are entitled to federal employees' compensation.

There was a collision between a United States navy vessel and a British freight steamer. One navy man lost a leg and an eye; another was mangled in the pelvic region and will be a cripple for life. Both vessels were at fault. The British vessel is ready to pay its share of the damages but the United States claims that, because these men are entitled to federal pensions, it cannot be made to contribute to the damages for the injury, unless the men will waive, or risk losing, their pension rights.

The Army operates a ferry service between Brooklyn and Staten Island Army Base to transport carpenters and other workmen, all civil employees of the United States, to their place of work. This ferry is a public vessel. On

one occasion this ferry negligently crossed the bow of a Norwegian vessel, was struck, and two men were killed and several injured. The government has taken the position that, since its civil employees come under its Compensation Act, no damages can be collected for the tort.

Government counsel are also claiming that the Public Vessels Act does not allow recovery for injuries or death, notwithstanding the decision of this Court in *Canadian Aviator* v. *United States,* 65 S. Ct. 639.

These, and numerous kindred situations, require a decision by this court which will finally settle the question of pensions as a bar to civil liability for negligence, and particularly in the instant case, whether the Virginia death statute affords a right in parents as against the pension provisions.

Other reasons why the writ should be granted are found in the errors of law in the decision complained of, and hereinbefore set out.

Petitioner prays that the writ of certiorari be granted.

Dated, New York, N. Y.,
November 20th, 1945.

Respectfully submitted,

SIMONE N. GAZAN,
Attorney for Petitioner.

Certificate

I hereby certify that I have examined the foregoing Petition, and in my opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

SIMONE N. GAZAN.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

POINT ONE

A merchant vessel, the possession, custody and control of which remains in a private corporation, and which is manned and navigated by civilian officers and crew, does not become a public vessel simply because she was allocated to transport war materiel for the army.

The court below erred in holding that the steamship "John Morton" was a public vessel simply because she had been allocated to carry military supplies and, at the time of the collision, had aboard some coal for delivery to the army.

What constitutes a public vessel? Technically, any vessel owned by a foreign country is considered a public vessel of that country, but in this country there has been such demarcation between merchant vessels and public

vessels. although both were owned by the government, that we must have a definition which is appropriate to our particular system.

Surely a government cargo ship, carrying munitions to the war zones, would not *ipso facto* become a public vessel just because of the nature of her cargo. A government-owned merchant ship would not in this country be considered a public vessel just because of the ownership. The crews of such government-owned merchant vessels, under existing laws and customs, may proceed in admiralty to enforce rights just as if the vessel were privately owned.

To our mind, a "public vessel" is one owned or under the exclusive control of the sovereign; manned by its army or navy crews; the operation and navigation under the sole command of the military personnel, and utilized in furtherance of the war effort, and restricted to performing the functions of government.

What are the facts in regard to the classification of the steamship "John Morton"?

The government publishes a book entitled "Merchant Vessels of the United States, 1944". The court will take judicial notice of this publication. Under the classification "Steam Vessels" we find the steamship "John Morton" listed as a merchant vessel, and thus proclaimed to be such by the government.

The steamship "John Morton" was a freight vessel. She had been delivered to Luckenbach Steamship Company, a private corporation, as operator, for and on behalf of the War Shipping Administration, under a General Agency Agreement.

In April 1944 certain vessels were allocated to carry war material from Hampton Roads to England. The "John Morton" was one of them, but she was not unconditionally turned over to the Army. The agreement for

her use stipulated that she was to be "crewed by the W. S. A." There was no bare-boat transfer.

Stipulation,* Exhibit "B"

Not only that, but shifting of the vessel was to be "By General Agents (Luckenbach) as required under W. S. A. direction"; even clearance and sailing "To be attended to by General Agents."

Stipulation, Exhibit "A-2"

So completely was control of the vessel retained by the General Agents that, when the Army desired to put a security officer aboard as a passenger, permission had to be obtained from W. S. A.

Stipulation, Exhibit "A-4"

The Luckenbach Steamship Company remained in charge of the operation and navigation of the "John Morton" to such exclusion of the Army that instructions in regard to ballast for the return voyage were sent by the War Shipping Administration to Luckenbach Steamship Company, and not to the Army.

Stipulation, Exhibit "A-8"

This ship never lost her character as a merchant vessel. She continued to be manned and operated by a civilian crew. Her internal management remained in the civilian Operating Agent. Under the terms of the allocation a private, civilian steamship company was designated "as berth agent for commercial and Lend Lease cargo."

Stipulation, Exhibit "A-7"

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* The Stipulation and Exhibits are not embodied in the Transcript of Record but will be submitted should this case reach argument.

If the mere carrying of munitions or war supplies converted that merchant vessel into a public vessel, then every cargo bottom in every convoy which left our shores, was a public vessel solely by virtue of cargo. We doubt if that is the test.

The concept that the carrying of war material or food for the relief of distressed populations, constitutes the carrying vessel a public vessel, derives from the decision of this court in *The Western Maid,* 257 U. S. 419.

That case is readily distinguishable from this *Bradey* case. "The Western Maid" was owned by the Shipping Board. She was allocated for use by the Navy. The *bare boat* was *physically delivered* to the Navy. The Navy took *exclusive possession of her* and put *a navy crew aboard.* There was a complete termination of all possession, operation and control by the Shipping Board. The navy had her; manned her; navigated her and exercised exclusive control over her. She was thus engaged in performing a function of the sovereign, just like any other auxiliary naval vessel.

And the same is true of the other vessels which were under consideration along with *"The Western Maid"* case.

The "Liberty" was a pilot boat under bare-boat charter to the United States and manned by *a navy crew.* She had actually been commissioned as *a navy dispatch boat* in the war service.

The "Carolinian" also was under bare-boat charter, *manned by an army crew,* and assigned to the army *as an army transport.*

And each of those cases arose before the enactment of the Public Vessels Act.

Now we have a remedy under the Suits in Admiralty Act if the ship was a merchant vessel, and also a remedy

under the Public Vessels Act if the ship was a public vessel.

So, the classification of the vessel as "merchant" or "public" would be unimportant under present laws, except that the court below has written into those laws an esoteric exception, to-wit, that naval personnel are excluded from their provisions. No such exception appears in the text of the statute and the court resorted to its own decision in the case of *Dobson* v. *United States*, 27 Fed. (2d) 807, which held that a crewman of a naval vessel could not sue the United States as owner under Public Vessels Act for a tort committed *by his own vessel.* The reason for that conclusion was that the navy crew was entitled to government pensions.

The court below side-stepped two facts in this *Bradey* case, either of which would take the case without the rule in the *Dobson* case, to-wit,

1. The suit is not against the libelant's own vessel. Were it not for the Suits in Admiralty Act, and the "John Morton" had been privately owned, that vessel, or her owner, would have been proceeded against.

2. The cause of action sued on is one created by the death statute of Virginia which allows recovery by parents for elements of damages not covered by any pension, and regardless of dependency.

The Circuit Court of Appeals entirely ignored the question as to libelant's right to recover under the Virginia statute, independently of any pension benefits.

The Circuit Court of Appeals brushed aside the Virginia statute, thinking that it was just a survival statute, like the Lord Campbell's Act whereas in fact it created a new and original cause of action for the recovery of elements of damage not recoverable under the Lord Campbell's Act.

The cases of *The Norman Bridge,* 290 Fed. 575 and *United States* v. *City of New York,* 8 Fed. (2d) 270, held that the mere use of a vessel for carrying food to war sufferers, regardless of how and by whom operated and navigated constituted her a public vessel. These cases were wrongly decided and should be overruled.

POINT TWO

Public Law 17 applied, by its terms, to seamen employed "through the War Shipping Administration" and contains no warrant for the conclusion that it evidences any public policy whereby navy crewmen, or their families, have no right to sue for damages caused by another W. S. A. vessel's negligence, because of existing pension rights.

The United States, as owner or bare-boat charterer of merchant vessels, desired to have these vessels manned, equipped and supplied by the same private steamship companies as had managed and conducted their own pre-war businesses as independent operators, and, in the same manner, to obtain crews through recognized seamen's unions. But, since the United States constituted these private companies as its agents, and the vessels would be manned, equipped and supplied by them for the account of the government, and the payrolls etc. would be paid by the government, thereby the officers and crews of such vessels would become civil employees of the United States. As such civil employees they would be entitled to the benefits of the Federal Employees' Compensation Act and the Civil Service Retirement Act.

It was neither intended nor desired that the crews of these merchant vessels should thus lose their standing as merchant seamen, privately employed. It was intended and desired to preserve to them all rights under the spe-

cial legislation in their behalf, such as the Jones Act; the Suits in Admiralty Act and the Death on the High Seas Act, as well as all rights and benefits under the general maritime law.

In order to avoid any possible doubt that such seamen on government merchant vessels retained their status as privately employed merchant seamen, and were not civil employees of the United States, Public Law 17 was enacted. It applied solely to officers and members of crews employed "through the War Shipping Administration".

50 U. S. C. A. App. 1291.

Therefore, the Public Law 17 has no application to naval personnel on a war vessel. It was special legislation to make certain that merchant seamen, members of maritime unions, would remain and be deemed as privately employed, even though the government paid their wages, so that they would look to the already existing laws protecting the rights of privately employed merchant seamen and were not to be regarded as civil employees of the United States.

There was no justification whatsoever for the Circuit Court's finding that Public Law 17 furnished the "warrant" for their supposition that public policy had undergone no change since the *Dobson* decision, and forbade a tort action in behalf of navy crewmen, simply because they were entitled to federal pensions.

Here's what the Senate Committee on Commerce (Senate Report No. 62, Feb. 22, 1943) had to say about Public Law 17:

> "In the exercise of its various functions and the conduct of its activities, the War Shipping Administration in general is authorized to operate with the

> powers of a business or a commercial organization under the provisions of the Merchant Marine Act, 1936. These activities are so broad and so manifold and the need for emergency action is so great, that the Administrator cannot function with the usual restrictions applicable to Governmental agencies * * *"
>
> "Various difficulties have arisen with respect to the benefits and remedies for seamen employed by, or on behalf of, the War Shipping Administration on vessels owned or bare-boat chartered to it. These questions arise because of a technical status of such seamen as employees of the United States by virtue of their employment through the War Shipping Administration for service on such vessels."

To solve the posed problem the Congress enacted Public Law 17 which definitely classified the government-paid seamen on merchant or public vessels, operated by the War Shipping Administration, as merchant seamen, privately employed.

With the foregoing history of Public Law 17 we cannot appreciate how the court below could have concluded,

> "This appears to us to show that Congress did not expect those in its service upon 'public vessels' to enjoy at once the privilege of employees' compensation and the right to recover damages for the same injuries."

Congress was not apprehensive that seamen on government merchant vessels would be entitled to *both* employees' compensation and damages for the said injuries. Congress simply wanted the merchant seamen to retain their existing rights and remedies as private employees—indemnity, maintenance and cure—and not lose them by any technical classification of them as civil employees, and thereby restrict them to compensation under the Federal Employees' Compensation Act.

Congress was not thinking of its naval personnel and their rights against third parties, or the rights of their surviving parents under a state death statute. Congress simply wanted to prevent thousands of civilian seamen, under emergency employment by a governmental agency, from being considered civil employees and thereby lose their beneficial status as private merchant seamen.

Public Law 17 expressly preserved all rights in these merchant seamen to pursue their accustomed legal rights and remedies "nothwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act".

The court below committed error in so interpreting Public Law 17 as to read into it the meaning that, because certain merchant seamen were permitted to retain their private-employee status, therefore naval personnel could not sue a vessel other than their own.

POINT THREE

There is no public policy of the United States which prevents the personal representative of a deceased Navy man from suing the owner of a vessel, not his own, which negligently inflicted fatal injuries.

The world has moved since the *Dobson* case, 27 Fed. (2d) 807 was decided in 1928. The Congress has legislated, and this Court has liberalized, to make the United States and its corporations and agencies subject to suit, just as if sovereign immunity did not exist, and that the government, and government owned corporations and agencies, were private parties, subject to suit as such.

If there be a public policy of the United States it stands forth clearly as one in favor of suits against it, and its agents, for meritorious causes of action.

The Fleet Corporation, wholly owned by the United States, was subject to direct suit for tort.

Sloan Shipyard v. *Fleet Corporation,* 258 U. S. 549.

The United States Shipping Board, a governmental agency, was subject to suit.

U. S. Shipping Board v. *Harwood,* 281 U. S. 519.

Likewise the Reconstruction Finance Corporation.

Reconstruction Finance Corp. v. *Menihan,* 312 U. S. 81.

And similarly the Federal Housing Administration (*Burr* case, 309 U. S. 242) and the Federal Land Bank (*Priddy* case, 295 U. S. 229).

The public policy suggested in the Dobson decision no longer obtains. The bars have been let down. The United States by the Merchant Marine Act, the Suits in Admiralty Act, the Death on the High Seas Act, and Public Law 17 has virtually stripped itself of sovereign immunity as to suits for tort.

These statutes establish a standing renunciation of sovereign exemptions.

Robinson on Admiralty, page 276.

The alleged public policy, upon which the court below relied, simply does not exist *now* whatever may have been the case when the *Dobson* case was decided.

POINT FOUR

A cause of action exists against the United States in favor of Naval personnel for a tort committed by a vessel, not his own, albeit Government owned.

We agree that the family of a deceased naval employee cannot sue the United States under any *federal* statute, for death caused by negligence or unseaworthiness *on his own vessel.*

Where a shell exploded on the Coast Guard ship "Seneca", a libel against the United States, as owner, under Public Vessels Act was dismissed because it was held that the Act did not cover naval personnel *as to their vessel.*

O'Neal v. *United States,* 11 Fed. (2d) 869; affirmed, 11 Fed. (2) 871.

And the same interpretation was reached in the cases growing out of the collision between the liner "City of Rome" and the submarine S-51. Administrators of deceased naval officers of the submarine brought libels, under the Public Vessels Act, against the United States, as owner of the submarine, which was charged with unseaworthiness and negligence. The Circuit Court sustained a dismissal of the libels.

Dobson, et al. v. *United States,* 27 Fed. (2d) 807.

In the Dobson decision the Circuit Court, without deciding the question, nevertheless said that the Public Vessels Act was so sufficiently broad that, were the libels by seamen or passengers on the "City of Rome", against the submarine owner, it would sustain it.

Two judges of our District Court have held that the Public Vessels Act covers personal injuries.

Porello v. *United States* (Judge Coxe), 53 F. Supp. 569;
Militano v. *United States* (Judge Conger), 55 F. Supp. 904 (6).

And the Act has been expressly held to cover death caused by collision, the fault of a public vessel.

New England Co. v. *United States,* 55 Fed. (2d) 674 (7).

The "John Morton" was owned by War Shipping Administration, an agency similar to the old Shipping Board. The destroyer "Parrott" was a naval vessel just like the vessels of the Coast Guard, and owned by the United States.

Where there was a collision between a Coast Guard vessel and a Shipping Board vessel, and a crew member of the Coast Guard vessel was killed, a right of recovery against the merchant vessel, also owned by the United States, was sustained.

> "C. G. 113 on July 20, 1928, in the vicinity of Overfalls Lightship, collided with S. S. 'Culberson', a Shipping Board vessel, and Wooten, a member of the Coast Guard, lost his life. Held: 'Where a member of a Coast Guard crew loses his life in a collision for which a Shipping Board vessel is liable, his administratrix may recover damages and funeral expenses.'"
>
> *Wooten, Admx.* v. *United States,* 1931 A. M. C. 1997.

On appeal, there was no serious claim that there was no liability. The question involved was solely the amount of damages. Said the court.

> "The amount of damages is the only question before us, for there is no serious contention that the libelant is not entitled to an award."
>
> *The Culberson,* 61 Fed. (2d) 195.

Suits by United States employees against government agents or agencies are not strangers to our courts.

Postal clerks in railroad mail cars are government employees. During the operation of the railroads for the government by the Director General of Railroads, a rail-

road mail clerk, injured through the negligence of the Director General's servants, could sue the Director General, even though *the plaintiff was a government employee and the defendant was a government agency.*

> "Under Federal Control Act, Sec. 10 (Com. St. Ann. Supp. 1919 Sec. 3115¾ j.) a railway mail clerk, injured on a railroad being operated by the Director General of Railroads, had a right of action against the Director General for negligence, and the recovery, if any, would be from the United States."
>
> *Dahn* v. *Davis, Agent,* 258 U. S. 421.

Of course Dahn, having elected to receive, and did receive, federal compensation, he thereby forfeited his right to recover damages. But for that election, his right to sue the governmental agency would have been preserved.

It must be borne in mind that at the time of the Dahn decision the Federal Compensation Law provided that mere acceptance of compensation waived the right to a third party action. Had Dahn not accepted the compensation this Court said that he, a federal employee, could have sued the Director General, a federal agency.

We see no difference, in principle, between the dependents of a navy man, a federal employee, suing the War Shipping Administration, a federal agency, and a railway mail clerk, also a federal employee, suing the Director General, a federal agent.

The War Shipping Administration is the lineal descendant of the Fleet Corporation, Shipping Board and Maritime Commission, and inherited all of their powers and liabilities. That it was not incorporated is beside the point—it possesses all the elements of the independent entity of its progenitors.

A suit against the Fleet Corporation, wholly owned by the United States, was not the same as a suit against the sovereign owner.

> *Lindgren* v. *Fleet Corp.*, 55 Fed. (2d) 117; certiorari denied, 286 U. S. 542.

And suits against federal agencies, performing business or commercial services for the sovereign, are sustainable notwithstanding the sovereign may eventually have to pay.

> *Federal Housing Administration* v. *Burr*, 309 U. S. 242 (4); 60 S. Ct. 488.

The War Shipping Administration, as the successor to the Maritime Commission, acquired "All the general and implied powers of a business corporation."

> Opinion of the Attorney General, 1944 A. M. C. at page 595;
> 46 U. S. C. A. 1118.

> "In the exercise of its various functions and in the conduct of its activities, the War Shipping Administration in general is authorized to operate with the powers of a business or commercial organization under the provisions of the Merchant Marine Act, 1936."
>
> Senate Committee on Commerce Report, Vol. 1, United States Code Congressional Service, 1943, pages 2-12.

And, of course, the constructing, equipping, manning and operating of a fleet of cargo ships is a business venture, even if, at times, the ships act as fleet auxiliaries or public vessels.

The suits are maintainable against the United States, as represented by the War Shipping Administration, for the

benefit of dependents of a navy man where the action is not against his own ship but against a *de facto* third party, albeit such third party is an agency of the United States, the employer of the decedent.

POINT FIVE

The Death Statute of Virginia created a new and original right of action which may be enforced against the United States, as represented by War Shipping Administration, notwithstanding the deceased himself had no right of action under any law.

Particularly is this true when the right of action does not derive from any federal law but solely from a state statute.

Without the Virginia Death Act there would be no cause of action; for neither the Death on the High Seas Act nor the Jones Act applies, and, there is no right under general admiralty law to recover for death.

This is not a suit under any survival statute. It is not a suit to enforce a cause of action which was personal to the deceased. It is not a suit to recover for any conscious pain or suffering by deceased, nor for any injury to him.

It is a special and new cause of action arising out of the death.

Let us assume that the contention of respondent is correct, and that the deceased himself had no right of action for his injuries either against his own ship or the other vessel, and, therefore, none could survive, still *a new cause of action* arose *at his death,* a creature of the Virginia statute, and which the beneficiaries may enforce against the wrongdoer, irrespective of whether the deceased had any personal rights. In other words, the suit

is upon an original cause of action, created at the instant of death, and not concerned with any personal rights which the deceased may or may not have had, had he survived. It had no existence until the death occurred.

> "The death statute creates a new and original right of action in the surviving relatives of the deceased * * * not a mere survival of the cause of action which had previously existed in the deceased."
>
> *Virginia Iron Co.* v. *Odle's Adm'r,* 128 Va. 280; 105 S. E. 116;
> *Atlantic Greyhound Lines* v. *Keesee,* 111 Fed. (2d) 657 (8).

The elements of damage under the Virginia Act are based upon sentimental and humane considerations and not upon the cold and mathematical basis of pecuniary loss. These elements necessarily come into being *after* the death, because they cover the grief and mental anguish of the parents, for being deprived of the society, solace and comfort of their son; for *their* mental anguish over the pain and suffering *endured by their son.*

> *Anderson* v. *Hygeia Hotel Co.,* 92 Va. 687, 692;
> *Ratcliff* v. *McDonald, Admr.,* 123 Va. 781;
> *Virginia Iron* v. *Odle's Admr.,* 128 Va. 280.

These elements have no regard for mere pecuniary loss. They may be recovered whether the family is rich or poor.

> *Crawford* v. *Hite, Admr.,* 176 Va. 69, 76.

The court below erred in dismissing the libel for it set forth a good cause of action under the Virginia statute, the enforcement of which could not be defeated by an alleged public policy in view of the federal statutes which expressly consent that the United States may be sued

in admiralty for torts committed by its vessels, either merchant or public, if a private owner, under like circumstances, would be subject to suit.

POINT SIX

The fact that the United States created a pension system for its naval forces, and that parents of a deceased Navy man receive such pensions, cannot operate to bar a suit under a state statute.

In the first place, the pension is a creature of statute and is purely a voluntary beneficence bestowed upon the families of those who meet death in the naval service. The pension is for the benefit of the parents, as such, and did not depend upon the existence of any cause of action, or supposed cause of action, against the employer.

Partridge v. *United Elastic Corp.*, 288 Mass. 138; 192 N. E. 460.

The pension may offset mere pecuniary loss but it cannot heal the mental pain, the heart-distress and the sense of bereavement of the parents. It takes no regard of sentimental values, yet those are the principal elements under the Virginia statute and for which suit is brought.

See Libel, articles 11-14 (R., p. 5).

Under the Virginia statute the jury may disregard pecuniary loss and award such damages as may be fair and just.

Matthews v. *Warner, Admr.*, 70 Va. 570 (2).

So that the pension system can afford respondent no defense to an action under the Virginia Death Statute,

for the pension does not, and was never intended to, substitute for the original cause of action created by the Virginia Death Statute and the unique elements of damages allowed thereunder.

Nor can the respondent find either set-off or defense in the pension law because it is liable for the *whole damages* caused by its negligence and it cannot diminish, nor escape, that liability simply because the beneficiary may have been paid a pension, or other benefits, from a source not predicated upon its legal liability for the tort. The pension really contemplated a non-actionable disability or death, in the line of military duty.

The family is entitled, *as a matter of right,* to the pension and the matter of pension should be disregarded in considering the legal liability for the death.

Shea v. *Rettie,* 287 Mass. 454.

"In assessing the damages for death of one employed in city fire department, pension which widow is receiving from city should not be considered."

Geary v. *Metro. St. Ry.,* 73 App. Div. 441.

"The amount awarded one enlisted in the United States Navy for loss of time because of injury negligently inflicted upon him by a third person should not be deducted from the total amount awarded him as damages, although he continued for a time to draw his pay from the government and received an allowance for vocational rehabilitation under the Federal statutes."

Cunnien v. *Superior Iron Works,* 175 Wis. 172 (5).

"One sued for negligently injuring employee of United States cannot set up payment of compensa-

tion to such employee by United States under Compensation Act in mitigation of damages."

Lassell v. *City of Gloversville*, 217 App. Div. 323 (2).

The pension law exists independently of civil liability for injury or death. Pensions were created voluntarily by Congress without regard to any legal responsibility to the beneficiaries, sounding in tort. The payment of pensions was voluntarily assumed by the government and was intended to be made notwithstanding any state death statutes.

Where suit was brought against the United States on a war risk insurance policy the fact that the United States had paid compensation to the plaintiff was held irrelevant, since the liability under the policy was a *separate obligation* and the *voluntary payment of compensation could not affect it.*

Christman v. *United States*, 61 Fed. (2d) 673, at 674;
Lomicka v. *United States*, 2 Fed. Supp. 766.

Conclusion

The United States, as represented by the War Shipping Administration is, in effect, but another unincorporated Fleet Corporation, or, like unto the Director General of Railroads. Such Administration has been made subject to suit under the Suits in Admiralty Act. Such Administration is engaged in a non-governmental function in operating cargo vessels. Even if a vessel be diverted to war use, and *ipso facto* a public vessel, still a liability exists under the Public Vessels Act.

The parents of an employee of the sovereign, killed through the negligence of another vessel, operated by the "business" and non-sovereign Administrator, may sue for damages under a state death statute where the death occurred on navigable waters within the territorial limits of a state, and the cause of action is new and original, and personal unto decedent's family.

The Virginia Death Statute is totally different from Lord Campbell's Act. It is more than a survival statute. It creates a cause of action undreamed of by Lord Campbell. It is not only original and distinctive, but quite peculiar to Virginia. It is expressly applicable in cases where the death is the result of the wrongful act "of any ship or vessel."

Exhibit "A" to Libel, Record p. 10.

The fact that the United States had established a system of voluntary pension, and other benefits, for the dependents of naval personnel, cannot operate to defeat such state law cause of action which is based upon elements of damages not personal to the deceased, but upon a new and original cause of action which only came into being at the time of the death. The pension law was not enacted in anticipation of suits under state statutes.

The Public Vessels Act applies to personal injury and death inflicted by the negligence of a public vessel against seamen on another public vessel.

The duality of government activity whereby it is both sovereign and commercial in distinct relationship to the world, makes its commercial branch amenable to the state laws where an agency of the sovereign branch negligently causes damage, and as to which sovereign immunity has been waived.

The public policy, as now declared, is in favor of suits against the United States for torts committed by its employees and agents. This is true even as to public vessels. That public policy is now so broad that merchant seamen, employed by the government, may sue for torts under Public Law 17 "notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act."

50 U. S. C. A. App. Sec. 1291.

The libel sets forth a good cause of action, and the decision of the Circuit Court of Appeals dismissing it, should be reviewed and reversed.

The writ of certiorari should be granted.

Respectfully submitted,

SIMONE N. GAZAN,
Proctor for Libelant.

INDEX

CITATIONS

677942—46

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 622

MATTIE BRADEY, AS ADMINISTRATRIX OF THE ESTATE OF MARION THOMAS BRADEY, DECEASED, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York (R. 18) is reported in 1945 A. M. C. 777. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 30–32) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 2, 1945 (R. 33). The

petition for a writ of certiorari was filed on November 23, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether libellant, as administratrix of a deceased enlisted man in the United States Naval Reserve who was killed in a collision between the Navy destroyer on which he served and a Liberty ship, owned and operated by the United States, may sue the United States in admiralty under a state death statute for damages for the alleged wrongful death, the administratrix as mother of the deceased Navy fireman having received, with her husband, all pensions, death benefits, and other benefits provided by law for surviving parents.

STATUTES INVOLVED

The statutory provisions, which are here primarily pertinent, are set forth in the Appendix, *infra,* pp. 10–12.

STATEMENT

This action was instituted by libel filed on June 22, 1944 (R. 1, 2–12) which set forth alleged causes of action under the Virginia death statute (R. 10–12) for the death of Marion Bradey resulting from injuries received by him while serving as Navy fireman, First Class, U. S. N. R., in the fire room of the destroyer *Parrott* (R. 15). The

injuries occurred in a collision between the *Parrott* and the Liberty ship *John Morton* in Norfolk harbor on May 2, 1944 (R. 3–4). The libel was based in the alternative on consent to suit by the United States evidenced by the Public Vessels Act, 43 Stat. 1112, 46 U. S. C. 781–790, or the Suits in Admiralty Act, 41 Stat. 525, 46 U. S. C. 741–752.[1]

Exceptions and exceptive allegations to the libel asserting lack of jurisdiction in the district court were filed on behalf of the United States (R. 12–14). After the filing of the exceptions, the facts were stipulated (R. 15–17). The stipulation discloses that the destroyer *Parrott*, an armed vessel of the United States Navy, was proceeding to sea as part of a Naval task force at the time of the collision in Norfolk harbor (R. 15). The *John Morton*, a Liberty type cargo vessel, manned by a civilian crew but owned and operated by the United States,[2] was, at the time of the collision, partially loaded with materials of war for the United States Army in the European theater and was proceeding to a different pier to complete its loading of Army cargo including tanks, tools,

[1] The libel also named the Luckenbach Steamship, Inc., agent for the *John Morton* as a respondent (R. 8–9). This phase of the suit is not here presented.

[2] The *John Morton* had been allocated by the War Shipping Administration to the War Department for the purpose of carrying munitions of war for the United States Army (R. 16).

guns, and other military supplies and materials (R. 15–17). While proceeding from its dock, the *Parrott* was rammed by the *John Morton* and the destroyer's side plates were fractured (R. 3–4). The libel alleged negligence in the operation of the *John Morton* and, for present purposes, such negligence may be assumed.

Petitioner and her husband, as surviving parents of the deceased, were and are entitled to all pension rights and other benefits provided by the United States by statutes and regulations governing Navy personnel (R. 15). Such pension and death benefits have been and are now being paid to petitioner and her husband (R. 15).

On the pleadings and the stipulation of facts, the District Court for the Southern District of New York sustained the exceptions and dismissed the libel (R. 18–19). On appeal, the Circuit Court of Appeals for the Second Circuit affirmed, relying upon its prior decision in *Dobson* v. *United States*, 27 F. 2d 807, certiorari denied, 278 U. S. 653. It held that the *John Morton* was a public vessel and that because of the compensation elsewhere provided for members of the armed forces, they must be deemed to be excluded from the protection of the Public Vessels Act.

ARGUMENT

1. As the court below held, it is clear that the *John Morton* was a public vessel of the United States at the time the collision occurred. *The*

Western Maid, 257 U. S. 419; *United States* v. *City of New York,* 8 F. 2d 270 (S. D. N. Y.); *The Norman Bridge,* 290 Fed. 575 (S. D. N. Y.), modified on different grounds, 13 F. 2d 435 (C. C. A. 2). In *The Western Maid,* which involved a vessel owned by the United States and assigned to the War Department for transportation of foodstuffs to Europe, this Court said (pp. 431–432):

> It is suggested that the *Western Maid* was a merchant vessel at the time of the collision, but the fact that the food was to be paid for and the other details adverted to in argument cannot disguise the obvious truth, that she was engaged in a public service that was one of the constituents of our activity in the war and its sequel and that had no more to do with ordinary merchandising than if she had carried a regiment of troops.

The court below commented on the foregoing cases and their relationship to that at bar in the following manner (R. 31):

> Those decisions concerned the carriage of food to Europe, or of gold from Europe to pay for food already delivered, after the first World War; and a far more plausible argument could be made that the ships performing such services were "merchant" vessels than can be made in the case of a ship like the *John Morton,* bound for a theatre of war, *flagrante bello,* with a cargo of coal and munitions, consigned to the Army.

2. The decision of the court below, rested on the prior decision of the same court in *Dobson* v. *United States*, 27 F. 2d 807, certiorari denied, 278 U. S. 653, is put upon the ground that Congress, in enacting the Public Vessels Act, did not reveal an intention, in the absence of specific language, to subject the United States to suit as a result of an injury caused a member of the armed forces by a public vessel where there existed a comprehensive system for compensating such persons for injuries or losses. There is such a compensation scheme here, for systematic pensions and death benefits are provided (38 U. S. C. 472, 472b, 701–733); six months' pay is immediately allowed to the qualified relative, in this case the surviving parents (34 U. S. C. 943); both officers and men are reimbursed for personal property lost or damaged by operations of war, ship-wreck, or other marine disaster (34 U. S. C. 984–989); war risk insurance and national service life insurance are available to personnel who qualify (38 U. S. C. 511, *et seq.*, 801–818); and wartime allowances are provided for dependents (37 U. S. C. 201–221). An award in this case would, in the light of these provisions, require that the United States twice compensate an injured member of the armed forces.[3]

[3] Petitioner (Pet. 18–21) apparently misapprehends the manner in which the court below relied upon the Act of March 24, 1943 (57 Stat. 45). That Act declared that officers and members of crews employed by the War Shipping Ad-

We submit that the compensation provisions contained in the above-described statutory scheme are exclusive and that military personnel lack power to maintain a suit against the United States founded on an injury already within the contemplation of one or another of the enactments. The view has been expressed that any other conclusion would be contrary to public policy (*Dobson* v. *United States, supra; O'Neal* v. *United States,* 11 F. 2d 869 (E. D. N. Y.), affirmed without opinion, 11 F. 2d 871 (C. C. A. 2)), and there is no reason to assume that that policy does not prevail simply because the cause of injury is a publicly owned ship other than the one on which the injured person was a crew member (cf. Pet. 6, 17, 22–23). Moreover, no different result follows if it be assumed that the *John Morton* could be classified at the time of the collision as a merchant vessel under the Suits in Admiralty Act, since the exclusive nature of the remedy afforded by the general compensatory scheme provided for members of the armed forces would likewise preclude recovery. *Posey* v. *Tennessee Valley Authority,* 93 F. 2d 726 (C. C. A. 5); *Sandoval* v. *Davis,* 278 Fed. 968, 973,

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ministration have all rights in respect to injuries or death that would obtain in respect of privately owned or operated vessels. It also specifically removed all such seamen from the coverage of the United States Employees Compensation Act. The obvious reliance put upon that Act was that Congress did not desire to confer two benefits or remedies for the same injury and that it considered that the provision made by the compensation statute would control unless it was specifically made inapplicable.

affirmed, 288 Fed. 56; *Seidel* v. *Director General of Railroads,* 149 La. 414; *Moon* v. *Hines,* 205 Ala. 355.

Petitioner relies upon the decision of this Court in *Dahn* v. *Davis,* 258 U. S. 421, for the proposition that an employee of the United States can recover for a tortious injury, consent to suit having been given, even if compensation is otherwise available. But that case stands only for the proposition that an election to take benefits bars the tort action. As shown by the stipulation here, petitioner and her husband as surviving parents are receiving all benefits and payments to which they are by law entitled. In the circumstances of this case, such benefits include the six months' gratuity under 34 U. S. C. 943, and the monthly compensation for death resulting from injury in the line of duty under 38 U. S. C. 472, 472b. No disavowal of these, or other payments such as the insurance benefits mentioned above, has been made. On the contrary, petitioner asserts a right to $15,000 damages, the maximum allowed by the Virginia death statute relied on (R. 11), *in addition* to statutory benefits and compensation. We submit that the receipt of statutory payments constitutes a bar to this action, even if it be admitted, *arguendo,* that an election was as open to petitioner here as the Court merely assumed it to be in *Dahn* v. *Davis, supra.*

Finally, petitioner contends that the Virginia death statute (R. 10), upon which she relies,

creates a new and original cause of action (Pet. 27–29). She urges that the statute is not a survival statute, nor is the instant suit one to enforce a claim personal to the deceased nor to recover for any injury to him. Even conceding that petitioner could recover damages under the Virginia statute which did not originally inure to the deceased, nevertheless, such right merely goes to the quantum of damages and not to the right to maintain suit. The inescapable fact remains that a suit cannot be maintained under the Virginia statute unless "the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, * * * and to recover damages in respect thereof" (R. 10). Here, clearly, the deceased, if death had not ensued, could not maintain the action against or recover damages from the United States.

CONCLUSION

The decision below is correct and there exists no conflict. We respectfully submit that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
PAUL A. SWEENEY,
SAMUEL D. SLADE,
Attorneys.

JANUARY 1946.

APPENDIX

Sections 1 and 2 of the Public Vessels Act, 43 Stat. 1112–1113 (46 U. S. C. 781–782), provide as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920.
>
> SEC. 2. That such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the

United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of an Act entitled "An Act authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes," approved March 9, 1920, or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

Section 2 of the Suits in Admiralty Act, 41 Stat. 525 (46 U. S. C. 742), provides as follows:

SEC. 2. In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy

thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

U. S. GOVERNMENT PRINTING OFFICE: 1946

Supreme Court of the United States

OCTOBER TERM, 1945

No. 622

MATTIE BRADEY, as Administratrix of the Estate of Marion Thomas Bradey, deceased,

Petitioner,

against

UNITED STATES OF AMERICA, as represented by War Shipping Administration,

Respondent.

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING

SIMONE N. GAZAN,
Attorney for Movant,
One Broadway,
New York City.

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Mattie Bradey, as Administratrix of the Estate of Marion Thomas Bradey, deceased, respectfully prays an order of this court allowing her to file a Second Petition for Rehearing based upon her Petition for Certiorari which was denied on January 28th, 1946.

Your movant respectfully shows that since the denial of her Petition for Certiorari, which sought to review a decision of the United States Circuit Court of Appeals for the Second Circuit, that the United States Circuit Court of Appeals for the Fourth Circuit has decided the

same legal question contrary to the decision of the said Second Circuit, thereby creating a conflict between Circuit Courts of Appeal which should be reconciled and the law settled by decision of this court.

WHEREFORE movant prays an order allowing her to file a second petition for rehearing.

Dated: New York, N. Y., May 29th, 1946.

Respectfully submitted,

SIMONE N. GAZAN,
Attorney for Movant.

Certificate.

I hereby certify that I have examined the foregoing Motion for Leave to File Second Petition for Re-hearing and in my opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

SIMONE N. GAZAN.

Supreme Court of the United States

OCTOBER TERM, 1945

No. 622

MATTIE BRADEY, as Administratrix of the Estate of Marion Thomas Bradey, deceased,

Petitioner,

against

UNITED STATES OF AMERICA, as represented by War Shipping Administration,

Respondent.

SECOND PETITION FOR REHEARING

Statement of Facts

MARION THOMAS BRADEY was one of the naval personnel on the destroyer "Parrott" which met in collision with the merchant vessel "John Morton" in the port of Norfolk, Virginia. Bradey was killed.

His administratrix brought suit against the United States of America, under the Suits in Admiralty Act, because the merchant vessel "John Morton" was owned and operated by the United States of America.

On exceptions to the libel the United States Circuit Court of Appeals for the Second Circuit held that there

was no right of action in this administratrix because the deceased, having been a naval employee of the government which provided a pension, that he had no right of action against the government as the owner of the offending vessel because such an action would be against the public policy of the United States, and also was unauthorized by any law.

Bradey v. *United States,* 151 Fed. (2d) 742.

Petition for certiorari was presented to this court and denied.

Since that denial the United States Circuit Court of Appeals for the Fourth Circuit in the case of *United States* v. *Marine,* decided by the Fourth Circuit on May 11th, 1946, as yet unreported, but which affirmed the case of *Marine* v. *United States,* 1946 A. M. C. 53, held that a government employee could sue the government for damages arising out of a *tort.* Copy of that decision is appended hereto.

This decision of the Fourth Circuit is contrary to the decision of the Second Circuit and this conflict should be settled by a decision of this court.

Reference is respectfully made to the Petition for Certiorari heretofore filed herein.

Movant shows that the question involved is highly important not only to the United States, but to all of its employees, both military and civilian, who may suffer injury or damage by reason of negligent action or unseaworthy conditions for which the United States would be civilly responsible were the injured party not an employee.

WHEREFORE movant prays a reconsideration of her Petition for Certiorari, and that she be granted a Second Rehearing because of the existing conflict between two Circuit Courts of Appeal.

Dated: New York, N. Y., May 29th, 1946.

Respectfully submitted,

SIMONE N. GAZAN,
Attorney for Movant.

Appendix.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT

No. 5477.

UNITED STATES OF AMERICA,
Appellant,

versus

GARLAND C. MARINE,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.

(Argued April 15, 1946. Decided May 11, 1946.)

Before GRONER, Chief Justice, United States Court of Appeals for the District of Columbia, and SOPER and DOBIE, Circuit Judges.

Southgate L. Morison (Bernard J. Flynn, U. S. Attorney; C. Ross McKenrick, Assistant U. S. Attorney; William A. Grimes and Ober, Williams & Stinson on brief) for Appellant, and George W. P. Whip (Avrum K. Rifman on brief) for Appellee.

Appendix.

GRONER, C. J.:

Garland C. Marine, a United States Custom Inspector, was seriously injured when in the discharge of his official duties he was leaving the Steamship "Dundas," a merchant vessel owned and operated by the United States. The injury occurred while the vessel was berthed at a dock in Baltimore Harbor and a libel, under Section 2 of the Suits in Admiralty Act,[1] was timely begun in the District Court for Maryland.

It is conceded by the United States that the injury was due to the defective, unsafe and unseaworthy condition of the vessel and her gangway, and to the fault and negligence of her crew, without contributory fault or negligence on the part of libellant. The District Court made an award of damages, the amount of which is not questioned.

In the court below and on this appeal the contention is that the Employees Compensation Act[2] provides libellant —an employee of the United States—his sole and exclusive remedy against the Government; in short, that the subsequent enactment of the Suits in Admiralty Act, in the circumstances, added nothing to his rights. The District Court rejected the contention. The single question, therefore is whether libellant may sue the United States under the Suits in Admiralty Act for an injury sustained by him on board a merchant vessel owned and operated by the United States.

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[1] 46 U.S.C. 742: "In cases where if such vessel were privately owned or operated, * * * a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States * * * provided that such vessel is employed as a merchant vessel * * *."

[2] 5 U.S.C. 751, *et seq.*

Judge Chesnut, in a well reasoned opinion, bottomed in large measure on the language of the Supreme Court in *Brady* v. *Roosevelt Steamship Co.*,[3] held that the suit was properly brought under Section 2 of the Act. That case was an action against the Steamship Company alone, to recover for personal injuries negligently inflicted by the Company while operating the S. S. "Unicoi" for the United States Maritime Commission. The facts in the case are in all material respects the same as in the case here. In both, a United States Custom Inspector in the discharge of an official duty was injured as a result of a defective ladder used as a gang-plank to board or leave the vessel; in each, the vessel belonged to the United States and was engaged in the merchant service. The difference in the two cases, aside from the fact that one was brought at law against the Steamship Company and the other in admiralty against the United States, is that in the *Brady* case the Government employee had claimed and received compensation under the Employees Compensation Act, whereas in the present case libellant made no such claim and no compensation was ever paid. In the *Brady* case suit was begun in a New York State Court and afterwards removed to the District Court, where it was tried to a jury, and, after denial of defendant's motion to dismiss because the remedy, if any, was exclusively under the Suits in Admiralty Act, a judgment was had on the law side of the court. On appeal the Second Circuit reversed (128 F. (2d) 169), on the ground that the Suits in Admiralty Act provided the exclusive remedy, and that accordingly the injured inspector's rights were limited to a libel in personam against the United States or the Maritime Commission.

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[3] 317 U. S. 575.

Appendix.

The Supreme Court granted certiorari to determine whether the Steamship Company, in the circumstances we have named, was, because of the provisions of the Suits in Admiralty Act, non-suable for the negligent exercise of its delegated powers. Answering the question in the negative, the Court reversed. It will thus be seen that the precise point involved in the *Brady* case is different from that involved in the present case. But in reaching its conclusion as to the Steamship Company's liability, the Supreme Court announced its views fully on the point involved here. For example, the Court said:[4]

> *"We agree with the court below that this was a maritime tort over which the admiralty court has jurisdiction."*
>
> *"And we may assume that petitioner could have sued either the United States or the Commission under the Suits in Admiralty Act."*
>
> *"In any event, such a suit would be the exclusive remedy in admiralty against either of them"*—(i.e., the United States or the Maritime Commission). (Emphasis supplied).

Granting all of this, the Supreme Court, nevertheless, thought that for its negligent acts as operating agent, the Steamship Company was liable to suit without regard to the Suits in Admiralty Act. It is of course not contended, as was pointed out by Judge Chesnut, that the quoted language of the Supreme Court was necessary to its decision, or that it is controlling here. But it would be going very far to conclude that what the Supreme Court said in that case is entitled to no respect, or that it should be disregarded, or even to suggest that it was

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[4] 317 U. S. 575, 577.

said incidentally and without consideration. And our view in this respect is confirmed by the fact that the Court was careful to qualify the precise and definite statements we have italicized by pointing out that what it said in that regard would not apply in a case in which the injured employee had asked for and received compensation under the Employees Compensation Act. All of this indicates, we think, that the whole opinion in the *Brady* case was intended as a complete coverage of the subject. And if we are correct in this assumption, it follows, of course, that the right of a person in the position of appellee to sue the United States under the Suits in Admiralty Act is unchallengeable.

But wholly aside from all of this, we have no manner of doubt from the plain words of the statute, considered in the light of the ordinary rules of statutory construction, that we are required to reach the same result. In substance, the provision in question is that whenever a proceeding in admiralty could be maintained against a privately owned and operated vessel, a libel in personam may be brought against the United States in the operation of its merchant fleet. We are not at liberty to alter or add to the plain language of the statute to effect a purpose which does not appear on its face. There is certainly no suggestion in this language, or in any other language of the Suits in Admiralty Act, which implies that the right is limited to persons outside the provisions of the Employees Compensation Act, and it is a fair inference that if Congress had intended that result it would have said so in unmistakable terms. The fact, of course, is that the inference is directly the other way.

In the case we are considering there is no dispute that had the Steamship "Dundas" been privately owned and operated, appellee could have maintained a libel in ad-

miralty.[5] Equally, it is true that until the passage of the Admiralty Act, or at least until the passage of the Shipping Act of 1916,[6] the vessel in fault being the property of the United States, Government immunity would have barred his claim. We may also safely assume that it would have been barred if, in the passage of the Suits in Admiralty Act, Congress had limited the waiver of immunity so as not to apply in the case of a person in the employ of the Government. But nothing of this nature appears. The Act was passed in deference to the decision in *The Lake Monroe,*[7] in which the Supreme Court held the Government and its wholly owned corporation, in the operation of a merchant vessel, liable under the provisions of the Shipping Act in all respects as a private shipowner, including the arrest of its vessels. In recognition of this liability, Congress enacted the Suits in Admiralty Act exempting the vessels of the United States and its corporations from judicial seizure in order to avoid the embarrassment and delay from their arrest and detention. The Act put, and was intended to put (except as to the arrest of its vessels), the United States on a level with private shipowners in relation to its business or trading activities. Considered in this aspect, we are unable to find anything in its terms or in its history which would preclude appellee's libel. See, *Johnson* v. *Emergency Fleet Corp.*, 280 U. S. 320, in which the legislative history is discussed and the Act held to provide the exclusive remedy against the United States and its business corporations arising out of the operation of its merchant vessels.

What we have shown as to a lack of any reservation of immunity in the Suits in Admiralty Act, applicable in the circumstances of this case, impels the conclusion

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[5] The Admiral Peoples, 295 U. S. 649.

[6] 46 U.S.C. § 801.

[7] 250 U. S. 246.

that there is nothing in the Act which expressly or impliedly excludes a Government employee from filing a libel under its terms. And in the same degree it is equally true that there is nothing in the Federal Employees Compensation Act which directly or indirectly would bar the right. The only applicability of the Compensation Act in a case like this occurs when the employee—as in the *Brady* case—has "made an election" to avail of its benefits. Appellee, having elected to sue under the Suits in Admiralty Act, now has no claim under the Compensation Act. For obviously he may not have both. Moreover, we think the analogy between the case we have and that of a railway mail clerk strengthens the result reached in this case. The right to sue under the Federal Control Act,[8] if anything, is narrower in its terms than the right to sue under the Suits in Admiralty Act. Yet the Supreme Court in *Dahn* v. *Davis Agent, etc.*, 258 U. S. 421, upheld the right of an employee of the Government to sue for an injury sustained through the negligent operation of the railroad, but also held that the right could be lost by an election to accept the benefits under the Compensation Act. See also, *Payne* v. *Cohlmeyer*, 275 Fed. 803.

Nor do we think the Public Vessels Act[9] affects the question. The decisions holding that an officer or enlisted man in the Navy may not avail of the Act in suits against a Government public vessel are placed largely upon the ground that it would be contrary to the long standing policy of the United States with respect to the personnel of its Naval forces. See *Dobson* v. *United States*, 27 F. (2d) 807; *Bradey* v. *United States*, 151 F. (2d) 742. It is apparent that these cases are wholly inapplicable to the facts in the present case.

Affirmed.

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[8] Act of March 21, 1918, c. 25, 40 Stat. 451.

[9] U.S.C. §§ 781-790.